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88-19

No. 88-___

In The

Supreme Court of the United States

October Term, 1988

MYRA HOLLADAY SIMS and
FLORIDA IMPORT AND COMPLIANCE ASSOCIATION,

Cross-Petitioners,

v.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, and CHARLES J. BRANTLEY, DIRECTOR, DIVISION OF MOTOR VEHICLES,

Cross-Respondents.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

CROSS-PETITION FOR CERTIORARI (RULE 19.5) OF CROSS-PETITIONERS SIMS AND FICA

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QUESTIONS PRESENTED UNDER RULE 19.5*

1. *The Eleventh Amendment question, reformulated to the facts:* On appeal from a District Court judgment granting declaratory and prohibitory relief only against a State agency enforcing a State statute that directly violates the Clean Air Act and discriminates discretely against a sector of Foreign Commerce by licensing prerequisites that importers cannot fulfill, did the Eleventh Amendment require the Court of Appeals to dismiss the case after the Court itself solicited an Eleventh Amendment plea from an Attorney General who had been personally joined as party defendant in the District Court, and against whom relief was sought, but who then was dropped as a party as he and the State insisted when they interposed no Eleventh Amendment defense to the federal claims?

2. *Attorney's Fee question, presented as fairly included in any certworthy Eleventh Amendment question:* When injured citizens of a State prevail in an action to enforce the Clean Air Act's express prohibition of State licensing impediments to the federally-controlled flow of Foreign Commerce through ports of the United States, is not the Clean Air Act to be considered as expressly securing citizens in a federal right, privilege or immunity as regards that forbidden activity under color of State law, such that prevailing claimants should be awarded attorney's fees against the defendant State agency, 42 USC §§ 1983 and 1988?

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* This cross-petition is a companion to No. 88-1950, a petition for writ of certiorari by cross-respondents here, seeking review of the same Court of Appeals judgment. Cross-petitioners as respondents in No. 88-1950 will file a brief there opposing the writ except on the Eleventh Amendment question.

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OPINIONS BELOW

The Court of Appeals opinions, described also in the petition in No. 88-1950, pp. 1 and 2, are contained in the appendix to that petition as App. A and B1. The in banc opinions were filed January 11, 1989, reported at 862 F.2d 1449 (11th Cir. 1989), and are set out at pp. A5-A104. The panel opinions were filed December 2, 1987, reported at 832 F.2d 1588 (11th Cir. 1987), and are set out at pp. A105-A214. They were vacated by in banc order at 840 F.2d 778 (1988).

The opinion and final judgment of the District Court for the Northern District of Florida, December 30, 1985, is not officially reported but is contained in the appendix to the petition in No. 88-1950 as App. D1, pp. A219-239.

This cross-petition relies in part on material in the appendix in No. 88-1950 (A___), and it contains a supplemental appendix (SA___) which does not duplicate material available in the appendix. The supplemental appendix sets out other pertinent submissions to and orders by the courts below.

JURISDICTION

This Court's jurisdiction was timely invoked in No. 88-1950 by the filing of that petition on May 31, 1989, within 60 days of the denial below of petitioners' timely motion for rehearing below, on March 2, 1989 (A5, A240, A259).

This cross-petition invokes the Court's jurisdiction under 28 U.S.C. § 1254(1) and Rule 19.5. Otherwise

untimely, the cross-petition is timely because filed within 30 days after receipt of the petition on June 1, 1989.

Question 1 of this cross-petition reformulates the corresponding Eleventh Amendment Question in the petition in order to recognize facts omitted from the petition which, so it seems to cross-petitioners, make the Question more worthy of this Court's consideration. Cross-petitioners' purpose is not to seek more practical relief than was afforded by the Court of Appeals on the Eleventh Amendment, but to assure review if at all on a question that is accurate in terms of the case.

Question 2 of the cross-petition seeks affirmative relief greater than was afforded by the Court of Appeals. Cross-petitioners recognize that Rule 20.5 constrains review unless the petition in No. 88-1950 is granted to review an Eleventh Amendment question or some other. As a claim for attorney's fees, it is of course also dependent on cross-petitioners ultimately prevailing before this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Foreign Commerce Clause, in Art. I, Sec. 8 of the Constitution:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations. . . .

The Supremacy Clause, in Art. VI of the Constitution:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . .

The Clean Air Act, in 42 USC § 7543(a):

> No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to [the vehicle emission standards of the Clean Air Act]. No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

The Eleventh Amendment to the Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Section 1979 of the Civil Rights Act of 1871, in 42 USC § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subject, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

And 42 USC § 1988:

> . . . In any action or proceeding to enforce a provision of [section 1979] of the Revised Statutes . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The State of Florida chooses not to verify that cars on its roads are equipped with effective emission controls and safety devices. The State abandoned its auto inspection system some years ago. District Court finding, A235. In response to a citation by the United States Environmental Protection Agency for excessive automobile emission pollution, the 1988 Florida Legislature authorized emissions control inspections "beginning March 1, 1990, or as soon thereafter as possible as determined by the department [petitioner Department of Highway Safety and Motor Vehicles]." Fla. Laws Ch. 88-129, § 3 (1988); codified at Sec. 325.203 (1), Fla. Stat. (1988 Supp.).

Ordinarily, therefore, at all times pertinent to this litigation, the owner of a car seeking a Florida tag and title paid the fees and was issued a tag and title. Regardless of the age of one's car, new or used, in sound condition or not as regards emissions and safety devices, previously tagged and titled in Florida or another state, or never so documented – Florida issues a tag and title. Florida does not ask whether the car has emission control devices, or seatbelts and doorlocks and such, or whether the car has been certified by any governmental authority, federal or state, as having such. "Unless," a State official testified, "it is one of the vehicles under the issue of this trial" (R4-42-18, record in the Court of Appeals) – a car bearing foreign title papers, presented for its first American registration:

> Q When I buy an automobile, whether it's new or used, a Ford, say, and go down to get it titled and registered, does anybody quiz me about compliance with safety standards?

A No, sir.

Q Nor emission standards?

A No, sir. Unless it is one of the vehicles under the issue of this trial.

Enacted in 1984, Fla. Stat. § 320.02(9) requires the Department to refuse tags and titles for imported foreign-built cars still bearing foreign titles, until they are "certified by the United States Customs Service or the United States Department of Transportation and the United States Environmental Protection Agency to be in compliance with" Clean Air Act emission standards and federal Highway Safety Act safety standards. App. E2, p. A264.

Those federal agencies have no mandate nor any authority from Congress to "certify" anything of the sort to the states, and they do not. District Court findings, App. D1, A222. The Florida agency therefore began demanding other prerequisites to a tag and title: other pieces of federal paper that federal agencies issue routinely for other purposes than to control owning and operating a car, including finally – six to nine months after importation – a National Highway Traffic Safety Administration letter to Customs releasing its interest in the bond given at the time of import. A222.

No federal law, regulation or practice impeded Myra Sims and others like her in titling and driving their cars at any time after Customs released them under bond at the port of entry. And the Clean Air Act declared, as regards State restrictions on tags and titles: "No state shall require certification, inspection, or any other

approval . . . as condition precedent to the initial retail sale, *titling (if any), or registration. . . .*" 42 USC § 7543(a).[1]

Florida's Statute operates, as intended, exclusively against certain Foreign Commerce as such. No other car or owner is so restricted. The District Court found on undisputed evidence that the law serves no local purpose but simply attempts to arrogate to a State agency the de facto enforcement of (what the State agency supposes to be) federal law and regulatory policy. That, the District Court found, was expressly forbidden by Congress as well as by the Foreign Commerce Clause.

"[T]he trials and tribulations that Florida has erected in their path destroys the common market of commerce for the entire United States as established by the Constitution. It is precisely this type of state action that the

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[1] We pretermit here, as unnecessary to the Eleventh Amendment question, a further demonstration that as a matter of federal regulatory fact and law an importer such as Myra Sims is free to own and drive her car while awaiting the end of the federal paperwork stream completing her customs entry. The Eleventh Circuit panel decision recognized her entitlement both as a matter of fact and federal law, 832 F.2d 1558, 1563 text at fn. 7, App. B1, pp. A122-A123. And the in banc majority agreed with the District Court that in any event it was solely the federal agencies' prerogative, not the State's, to interpret federal law and enforce its regulatory requirements. 862 F.2d 1449, 1455, A23-A24; A227-A228 (District Court). Question 3 in the petition in No. 88-1950 attempts to clad this issue in the "standing" terms employed by Judge Tjoflat's panel dissent, 832 F.2d 1558, 1574 Part D, an analysis which the author abandoned in dissenting in banc on "standing". The insubstantiality of the "standing" question is shown in respondents Brief in Opposition.

[Foreign] Commerce Clause was designed to prevent. . . ." District Court judgment, A238.

The District Court found that the statute offends the dormant Foreign Commerce Clause, A236-A239; is expressly preempted by the Clean Air Act, 42 USC § 7543(a), A227-A229; and is preempted as well by the Motor Vehicle Safety Act, 15 USC § 1392(d), A229-236. Rejecting the State's purported justification for usurping federal regulatory authority over emission control standards in the Clean Air Act, the District Court held, A227-A228:

> The state argues that it is not setting any emission standards of its own that must be met and that the challenged statute simply "insures that new cars coming on to Florida's highways comply with the Clean Air Act." Brief of defendants at 19. The state fails to recognize, however, that it is not its role to enforce such standards at the stage that it seeks to do so. It does not matter if the state has enacted standards that are different or identical to those enacted by the federal government at this point. The intent of Congress is very clear and specific: Prior to the first sale, the states are preempted from enacting *any* regulatory or enforcement scheme either of their own *or to complement the federal scheme,* with specific regard to titling and registration. Yet, this is precisely what the challenged Florida statute seeks to do. Enforcement of the Clean Air Act before first sale is the sole and exclusive prerogative of the federal government. . . . (Emphasis by the Court.)

The Court of Appeals panel agreed in virtually those terms that Florida Statute § 320.02(9) offended the Commerce Clause and was expressly preempted by the Clean Air Act, though not by the federal Safety Act. 832 F.2d 1558, 1564-70; App. B1 pp. A126-A148. The Court in banc

reaffirmed, 6-5, that the Clean Air Act wholly preempts the statute – evidently regarding its elements as indivisible – and declared it unnecessary to reach the dormant Commerce Clause issue. 862 F.2d 1449, 1458; App. A22-A38.

The Eleventh Amendment plea, a belated assertion by the Attorney General which the Court of Appeals panel said was "untimely and compelled" by the panel itself, 832 F.2d 1570, App. B1, A152, provoked a sharp 6-5 split in the in banc decision. It is posed as Question 1 by the petition in No. 88-1950 and by the corresponding Question in this cross-petition.

A most puzzling statement appears prominently at the head of the Attorney General's "Reasons for Granting the Writ" in the petition, p. 14:

> This case was filed by the Respondent against the State and its Department of Highway Safety and Motor Vehicles. No individual state official was ever a named party to the action.

This statement is inexplicable. Neither Attorney General Butterworth nor his predecessor, Attorney General Jim Smith – who was in fact "a named party to the action" – has ever before made such a statement in five years of litigation.

The Complaint filed in the District Court on July 25, 1985, sued "JIM SMITH, ATTORNEY GENERAL OF THE STATE OF FLORIDA" as a party defendant along with the defendant Department. Supp. App. A, SA 1, caption and introductory paragraph. The complaint alleged that unless enjoined "the defendants" – Jim Smith as Attorney General, as well as the Department – "will continue so to

enforce those unlawful and preempted restrictions against plaintiffs and others." SA 3, ¶ 12, *e.a.* The Complaint closed with a prayer for a preliminary and a permanent injunction against "the defendants." SA 5, *e.a.*

Attorney General Jim Smith appeared as a party in the District Court and as a party answered the Complaint. He joined in the Answer filed August 19, 1985, not simply as counsel named at the end, Supp. App. B, SA 7, but in the admissions and denials he as "undersigned counsel" pleaded for "the defendants." Supp. App. B, SA 6. Thus,

> The Defendants, by and through their undersigned counsel, hereby file their answer. . . .
>
> 1. The Defendants admit that part of Paragraph 1 that states the jurisdiction of this Court, and the reason the Plaintiffs are seeking relief against the Defendants. However, the defendants deny . . .

By joining Attorney General Smith as a party, the Complaint exploited both that officer's general law enforcement authority over § 320.02(9)[2] as well as a contemporaneous Florida statute requiring that the Attorney General be "served with a copy of the complaint and be entitled to be heard" when the constitutionality of a Florida law is at issue in State court proceedings.

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[2] The general power of attorneys general to enforce state laws was part of the predicate for joining Attorney General Young in *Ex Parte Young*, 209 U.S. 123, ___, 28 S.Ct. 441, 454 (1907), and doctrinally predicates the authority-stripping "fiction" attributed to that decision by, for example, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 114 at fn. 25 (1984).

The Florida statute[3] in terms affects only State court proceedings, but Local Federal Rule 5(b) in Northern District of Florida requires that the statute be observed as a "notice" device on filing a federal complaint contesting a Florida statute for constitutionality.[4]

By joining Attorney General Jim Smith as a party defendant, and complaining that he threatened official action to enforce the offending statute, and praying for injunctive relief against him, the Complaint uttered the incantation necessary to neutralize any Eleventh Amendment defense which the Department and Attorney General might interpose against declaratory and prospective injunctive relief on the federal questions pleaded in Counts I and II (Supp. App. A, SA 1-5).

For reasons they never stated of record, the defendants (not distinguishing between themselves in the single voice of Attorney General Jim Smith) objected to Smith's joinder as a party defendant (Supp. App. B, SA 6-7), and they prevailed on plaintiffs' counsel to withhold

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[3] Fla. Stat. 86.091 (1983), (1987), on Declaratory Judgments: "When declaratory relief is sought, all persons may be made parties who have or claim any interest which would be affected by the declaration. . . . If the statute . . . is alleged to be unconstitutional, the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard."

[4] Rule 5(b), Rules of the United States District Court for the Northern District of Florida: "Upon the filing of any action in which the constitutionality of a state statute, charter, ordinance, or franchise is challenged, counsel shall comply with the notice provisions of Section 86.091, Florida Statutes."

service of process temporarily. Supp. App. C, SA 8. Then their "undersigned counsel" – Attorney General Smith – filed an Answer for "the Defendants" including himself, and averred:[5]

> 4. The Defendants admit the allegations of Paragraph 4 [of the Complaint], but by stipulation in open court, the parties agreed that Jim Smith, Attorney General, should not be named a party defendant to this action.

The Defendants thus demanded according to what *they* said was an (unreported) "stipulation in open court" that defendant Smith be dropped as a party; and the same Defendants simultaneously *pleaded an Eleventh Amendment defense only to the pendent State law claim in Count III of the Complaint* (Supp. App. B, SA 7). It was no coincidence that Defendants Department and Smith omitted an

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[5] The quoted Answer of "the Defendants" admitting "the allegations of Paragraph 4" suffices to correct the uncharitable miscounting of parties defendant by the in banc dissent. The dissent says "Sims and FICA sought no relief against the attorney general" (862 F.2d at 1469 fn. 22, App. A, A92 fn. 22) and glosses over the Complaint's plural reference to "defendants" by referring – as though the Complaint did also – to "the named defendants" as "the State of Florida *and* the Department" (862 F.2d at 1469 text at fn. 23, A92). In both law and fact, the State of Florida, Department of Motor Vehicles and Highway Safety, was *one* defendant not *two*. Fla. Stat. § 20.04(1): "Each department shall bear a title beginning with their words 'State of Florida' and continuing with 'Department of ___'." Defendants expressly admitted the same as a matter of fact. Complaint ¶ 4, Supp. App. A, SA 2: "Defendant State of Florida, Department of Highway Safety and Motor Vehicles, *is* the department of state government principally charged to enforce. . . . Defendant Jim Smith is Attorney General of the State of Florida. . . ." See Answer ¶ 4, Supp. App. B, SA 6.

Eleventh Amendment defense to federal claims that would be immunized from it by the party-presence of Jim Smith, Attorney General; while they pleaded an Eleventh Amendment defense to a pendent State law claim, for which Smith's party-presence would likely be no antidote.[6]

On the very day the Department and Smith as Attorney General, Defendants, filed that Answer – August 19, 1985 – counsel for Sims and FICA filed a motion to drop Smith as a party "inasmuch as the Attorney General was named a party only to afford him the opportunity to be heard if he chose with party status, and the Attorney General has expressed a preference that he not be a named party." Supp. App. C, SA 8-9. The motion was routinely granted. Supp. App. D, SA 9.

The Department (and its counsel, the Attorney General) adhered to this status quo for two years, until March 1987. The case was tried in September 1985, and judgment was entered in December. App. D1, A219, A239. The appeal was argued before the Eleventh Circuit panel on Monday, September 29, 1986.

On February 18, 1987, the Clerk wrote counsel requesting briefs on new issues – mootness, standing, and the Eleventh Amendment – which the Court declared it was "obliged to address . . . *sua sponte*" (Supp. App. E, SA 10). [The in banc dissent is in error suggesting, 862 F.2d at 1469 fn. 25, App. A. A96, that the Eleventh Amendment was raised four months earlier at oral argument.] The

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[6] *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).

Clerk's letter cited, as regards the Court's duty to raise the Eleventh Amendment issue (SA 11),

> . . . *Sosna v. Iowa*, 419 U.S. 393, 396 n.2, 95 S.Ct. 553, 555-56 n.2 (1975) (Supreme Court addressed sovereign immunity question although it was not raised by the parties.)

Responding to this invitation, the Attorney General's incanted the Eleventh Amendment and pointed out that the case lacked a personal party-surrogate for Florida, whose authority might be "stripped". Sims and FICA, citing *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 515 n. 19 (1982),[7] objected to the Court's action – "in effect a solicitation of such a defense, which appellant Department now has asserted" (Supp. App. F, SA 12). The objection was "DENIED" by the panel (Supp. App. H, SA 13).

Cross-petitioners also moved the Court (Supp. App. G, SA 13):

> to add as a party defendant and appellant on such terms as are just, or temporarily to relinquish jurisdiction to the District Court that it may do so, Charles J. Brantley, Director of the Division of Motor Vehicles, Florida Department of Highway Safety and Motor Vehicles. Fed.R.Civ.P. 21.

That motion too was "DENIED" by the panel (Supp. App. I, SA 14).

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[7] The objection quoted, as the panel majority did later in its opinion, 832 F.2d 1570, A150, what this Court said in *Patsy*:

> [W]e have never held that [the eleventh amendment defense] is jurisdictional in the sense that it must be raised and decided by this court on its own motion.

Several months later, the panel decision on the merits reconsidered the motion to add Brantley "in light of the state's untimely and compelled assertion of the sovereign immunity defense." 832 F.2d at 1570, App. B1, A152. Saying "the matters to be weighed in ruling on such a motion can better be considered in the district court," *Id.*, A151, the Court panel affirmed the District Court's findings that the Florida statute offends the Clean Air Act and the dormant Commerce Clause, and remanded the joinder question for disposition by the district court:

> Although we do not interpret *Patsy* as prohibiting this court from raising the issue of sovereign immunity, we do recognize the inequity in allowing the state to now assert the defense of sovereign immunity without affording Sims and the FICA an opportunity to effectively counter the defense at this stage in the litigation.

The in banc dissent erroneously states that Sims and FICA did not renew their joinder motion before the Court in banc. 862 F.2d at 1469, fn. 25, App. A, A96 fn. 25.[8] That statement, apparently, is the source of petitioners' erroneous formulation of Question 1, petition No. 88-1950 p. i, saying the in banc Court acted "sua sponte" in ordering Brantley joined.

In fact the in banc brief of Sims and FICA renewed their prior motion to the panel, and expanded it. They asked, as perhaps a more suitable and convenient alternative, that the incumbent *Attorney General* "be restored as a

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[8] The in banc dissent: "The panel denied the motion on May 26, 1987, and Sims and FICA have not renewed it. The court therefore acts sua sponte in substituting [sic] Brantley as the party defendant at this time."

party." See excerpt from in banc brief filed May 2, 1988, App. Supp. J, SA 15, entitled:

> "D. THE ATTORNEY GENERAL SHOULD BE RESTORED AS A PARTY OR MR. BRANTLEY SHOULD BE JOINED TO CURE ANY ELEVENTH AMENDMENT IRREGULARITY"

In the end, as the Court is advised, the Eleventh Circuit in banc majority joined Mr. Brantley as a party to afford a nominal official presence for what the Attorney General claimed now had become an indispensable authority-stripping ceremony.

In the course of these tumultuous Eleventh Circuit proceedings involving multiple briefings from several amici as well as the parties, Sims and FICA moved the panel to award them an attorney's fee under 42 USC §§ 1983 and 1988, should they prevail. The merits of that motion were not discussed in the panel opinion, but a ruling denying it was subsumed in the exasperated footnote 6 to the panel opinion: "The motions not directly ruled upon in this opinion are denied." 832 F.2d at 1563, fn. 6; App. B1, A119.

Sims and FICA renewed their request for § 1988 attorneys' fees before the Court in banc. Their in banc brief predicated that entitlement both on the equal protection claim, unpleaded but tried by consent, and on their having prevailed on a claim of right, privilege or immunity under the Clean Air Act, 42 U.S.C. § 7543(a). As to the latter, cross-petitioners' in banc brief filed May 3, 1988, stated (Supp. App. K, SA 17):

> The Judgment redresses the deprivation of a right, privilege or immunity secured to appellees by the law of the United States, specifically the second sentence of 42 U.S.C. § 7543(a), securing appellees in the federal privilege or immunity of acquir[ing] tag and title free of any condition precedent imposed by the state by way of certification, inspection or other approval. *See Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S.Ct. 2502, 65 L.Ed.2d 555, 559 (1980).

The in banc opinion states, "All other pending motions [other than the renewed motion to add Mr. Brantley as a party] are denied." 862 F.2d at 1460, fn. 16 [The quoted sentence was omitted in the State's printing of that footnote in App. A to the petition in No. 88-1950, A50.]

The mandate issued by the Court of Appeals on March 13, 1989, App. C, A218, states: "IT IS FURTHER ORDERED that each party bear their own costs on appeal."

REASONS FOR GRANTING THE WRIT

A. The Eleventh Amendment Question.

"Whom the Gods would destroy, they first make mad." Longfellow, *The Masque of Pandora.*

It is not recorded whether Longfellow spoke of Eleventh Amendment doctrine itself, or rather of hapless judges and lawyers caught in its snares.

But if the Court were inclined to take an appropriate case in a further effort to separate the legitimate in this

doctrinal heritage from the exquisitely nonsensical, this may be the case.

The Court might ask one of the fundamental questions: whether, considering the claim of right and the relief sought, someone like Defendant Jim Smith, Attorney General, or Mr. Brantley, should be considered essential in the first place, for authority-stripping. No genuine sovereign interest of the State of Florida was implicated in this action.

Giving *Hans v. Louisiana,* 134 U.S. 1 (1890), all the deference its survival through history has earned, no sovereign interest of a State is compromised when one of its citizens (to whom the Eleventh Amendment itself addresses no message) asks a federal court to declare to the State, present through such agencies or officers as the State shall dispatch to court, that a certain piece of legislation unconstitutionally arrogates to the State's own superintendence federal law and policy that lie beyond the State's "sovereign" power to superintend.

It impugns no genuine sovereign interest of a State when one of its citizens asks a federal court to declare simply what Congress has declared in law, for example the Clean Air Act: "No state shall. . . ." The customary prohibitory injunction might be withheld in deference[9]

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[9] The Eleventh Circuit panel decision, deciding the case despite the Department's objection, and remanding for consideration of joining a surrogate individual official, might have been rationalized in these terms. The panel mentioned the District Court's *declaratory* relief as for the most part affirmed – the court's "finding" and "ruling" – but said nothing of the pro forma injunction. 832 F.2d at 1570, App. B1, A153.

to sovereign dignity until some State agent, *truly* ultra vires, gives cause for issuing the writ directed by name to him personally; but naming the State at the outset, as the party defendant interested as no one doubts, impugns no genuine sovereign interest of the State.

No money damages were sought in this case. There is no incursion of any sort into the State Treasury. No mandatory injunction was sought such as might directly or indirectly require Treasury expenditures. There is no fiscal element whatever. This alone dissipates much of the power that history has added to the sovereign immunity embodied in the Eleventh Amendment. This is no *Chisolm v. Georgia*, 2 Dall. 419 (1793), nor a *Hans v. Louisiana*, 134 U.S. 1 (1890). There is no retroactive award of damages, *Edelman v. Jordan*, 415 U.S. 651 (1974), not even a refund, *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945). The relief sought has no ancillary tendency, even, to command State funds. *Quern v. Jordan*, 440 U.S. 332 (1979). No close investigation is called for, as recently in *Pennsylvania v. Union Gas Co.*, ___U.S.___ (1989), whether Congress can and has abrogated the fiscal immunity of States from federal court suits of certain sorts.

Eleventh Amendment doctrine can properly be "understood as premised on a prudential balancing of state and federal interests." *Pennsylvania, supra*, ___ at ___, fn. 3 (Stevens, J., concurring). It is a daunting task to describe what genuine sovereign interest a State may have against merely prophylactic judicial remedies, deployed in aid of the most basic federal principle. But the sovereign interest of the United States in its judiciary

speaking clearly and directly to its State partner in federalism, is beyond cavil. Congress said to Florida in the Clean Air Act, "No state or any political subdivision thereof shall adopt. . . ." That there was a misguided if not defiant act is clear; but it was not Mr. Brantley who "adopted" that prohibited law, nor Jim Smith, Attorney General. The State itself adopted that law.

The Court may find it desirable to consider anew why, in such a case, the sovereign interest of the United States can judicially be uttered only to a surrogate or messenger – official human beings, not official departments.

The Court may think it more profitable to consider what really is constitutionalized by the Eleventh Amendment. The typical Eleventh Amendment *faux pas*, in a case where it need not be a bar, is said to be "the rare case in which a plaintiff foolishly attempts to sue the State in its own name." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 116 (1984). But it is not suing the State in its own name that is constitutionally anathematized. Where plaintiff's federal suit is otherwise defensible, as by authority-stripping allegations against an officer in his "official capacity", suing "the State in its own name" also is not only permissible; in the Eleventh Circuit, if plaintiff wishes to predicate a § 1988 fee award upon prevailing against the surrogate, suing "the State in its own name" is essential. *Glover v. Alabama Dept. of Corrections*, 734 F.2d 691, 695 (11th Cir. 1984), vacated on other grounds, 474 U.S. 806 (1985), on remand, 776 F.2d 964 (11th Cir. 1985),

conforming to *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 3106, 87 L.Ed.2d 114 (1985).[10]

Cross-petitioners Sims and FICA, invoking the prayer of their Complaint for "such other and further relief as may be proper" (Supp. App. A, SA 5), indeed claimed § 1988 attorney's fees in the Court of Appeals, and they would claim them in this Court, against a properly joined defendant: petitioner State of Florida, Department of Highway Safety and Motor Vehicles.

What is constitutionalized by Eleventh Amendment doctrine, therefore, in a suit for prospective relief against a State statute offending supreme federal interests and a direct command by Congress, is not the agency's "sovereign immunity" against suit in its own name, but something else. What is constitutionalized, it seems, is a perceived necessity for ceremonial authority-stripping, *Ex Parte Young*, and a proper personage for the leading role.

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[10] *Glover*'s Eleventh Circuit policy, 734 F.2d at 695, conformed to the personal/official dichotomy of *Kentucky v. Graham*, 473 U.S. at 167 fn. 14 ("Thus, implementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the State. See Ex Parte Young. . . .") is:

> [W]e hold that, even if otherwise immune, the governmental entity must be joined in the suit for purposes of the attorney's fees determination before it may be held liable for attorney's fees. . . .[W]e hold that this policy shall be applied as a rule of this Circuit to all cases filed after the date of this opinion.

So imbued with authority-stripping were the in banc dissenters below, and with a perceived constitutional necessity for a human/official party defendant, that they characterized the Court's joinder of Mr. Brantley as a *substitution* of Brantley for the Department: "the majority, acting sua sponte [sic], simply *substitutes* an individual – the director of the Department – for the State as the party defendant . . . ." 862 F.2d at 1469, App. A, A95; see also fn. 8 *supra*.

There was of course no substitution. A court-ordered substitution would have warred against that Court's own sound *Glover* policy, *supra* fn. 10, that any § 1988 attorney's fee claim such as Sims and FICA made must be predicated by first joining the State agency as a named party defendant. That policy implements, in a straightforward way, *Hutto v. Finney*, 437 U.S. 678, 699 (1978), which awarded § 1988 fees against an absent agency whose interests the Court found adequately "present" in its counsel, the State Attorney General.[11]

All this ruckus, joinder *versus* substitution, results from Eleventh Amendment doctrine that is too exquisite for mortal minds, which though useless in any practical sense excites a certain passion. (Never mind that Florida

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[11] *Hutto*, 437 U.S. at 699: "Although the Eleventh Amendment prevented respondents from suing the State by name, their injunctive suit against prison officials was, for all practical purposes, brought against the State. The actions of the Attorney General himself show that. His office has defended this action since it began."

refuses federally-mandated tags and titles, let's talk Eleventh Amendment.) Justice Scalia's words in another context are apt here: "that principle is too much at war with itself to endure." *Pennsylvania v. Union Gas Co.*, ___ U.S. ___, ___ (1989) (Scalia, J., dissenting in part).

Perhaps, after taking the case for decision, the Court will conclude as did the in banc dissenters, evidently, that counsel for Sims and FICA were "foolish" (acknowledging *Pennhurst's* scolding) to acquiesce in the request by "defendants", through Deputy Attorney General Mitchell D. Franks, Supp. App. B, SA 7, to drop defendant Jim Smith, as Attorney General, as a named party. Perhaps it was decisively "foolish" not to expect the Court of Appeals to invite the Attorney General (the State?) to change his (its?) mind about the need for an authority-stripping ceremony; and not to expect "due process" objections to nominally borrowing the Attorney General's name again, or Mr. Brantley's. In that event, the Court would wipe away five full years of judicial work, as the Attorney General now urges.

Perhaps, however, the Court would choose to craft a healthy *waiver* doctrine making all this distraction unnecessary: *waiver*, when an Attorney General does not promptly insist on a party-presence for authority-stripping in a prospective-relief federal-question suit. In such a case, that ceremony is the only residue of sovereign immunity. The Court's "waiver" jurisprudence is bound at present to damage-suit cases and their equivalent, honoring State treasuries. *E.g., Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 467 (1945); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

Without a reliable waiver doctrine, the federal judicial process is put at considerable risk in service of cosmetic values. In an adversary system the parties ordinarily define the issues according to an orderly schedule in the trial courts. When for whatever reason a State Attorney General does not covet and timely demand authority-stripping, it seems no affront to the State to suggest that the time for that ceremony, of such dubious value, passed with the State's filing of an answer omitting an Eleventh Amendment defense to the federal questions stated by the complaint (Supp. App. B, SA 6-7).

The need for a more reliable waiver doctrine is illustrated by this Court's experience in *Sosna v. Iowa*, 419 U.S. 393 (1975),[12] written by then Justice Rehnquist, and *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), by Justice Marshall. Both cases arose in the federal system and were potentially subject, therefore, to interposition of an Eleventh Amendment sovereign immunity defense. Both cases came to this Court without such a defense, but with rumors and intimations of same. In each case, after taking note of the potential impediment to speaking at all, the Court decided the merits issues and let any latent sovereign immunity question pass for later disposition by an inferior court.

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[12] *Sosna* speculated in a footnote that Iowa perhaps *waives* its sovereign immunity by appearing to defend on the merits, citing *McKeown v. Brown*, 167 Iowa 489, 499, 149 N.W. 593, 597 (1914). The Iowa decision applied common-law waiver principles (no Iowa statute) to a state court lawsuit, and said nothing about waiving Iowa's Eleventh Amendment sovereign immunity to suit in a federal court as in *Sosna v. Iowa*.

In one of them, *Patsy*, Justice Marshall noted that the Florida Board of Regents "expressly requested that we [the Court] address the exhaustion question and not pass on its potential Eleventh Amendment immunity . . . ." *Patsy*, 457 U.S. 496, 515 fn. 19 (1982). This request was voiced to the Court by Florida Assistant Attorney General Mitchell D. Franks, who briefed and argued the case. 457 U.S. at 497, 102 S.Ct. 2557, 2558, 73 L.Ed.2d 172, 176, 1450.

That was the same Assistant Attorney General Mitchell D. Franks who answering for "the defendants" in this case demanded that Jim Smith, as Attorney General, be dropped as a named party defendant. Supp. App. B, SA 6-7. It was the demand by Mr. Franks that deprived the Court of Appeals of a principal for an authority-stripping ceremony – Jim Smith, as Attorney General.

The question then occurs, if in *Patsy*, having solicited a ruling on "the exhaustion question" despite a latent Eleventh Amendment defense, Assistant Attorney General Mitchell D. Franks did not then admire the ruling he received from the Court, would the Board of Regents speaking through the Attorney General have been permitted to obliterate that ruling and the entire case by incanting "sovereign immunity" in a petition for rehearing?

That precisely is how the Attorney General wishes to dispose of District Judge Stafford's judicial labor in 1985, and three more years of labor by the Court of Appeals – not to mention the humble efforts of Sims and FICA, and their uncompensated counsel, to vindicate these small claims under the Constitution and laws.

Ironically enough, the one redeeming virtue of authority-stripping doctrine in this case is that the restored presence of an official Florida "person" satisfies the § 1983 condition for a § 1988 fee award against the State. Part B, *infra*.

There are several reasons, then, why this Court might consider this case a special opportunity for useful work on Eleventh Amendment sovereign immunity doctrine.

B. The § 1988 Attorney's Fee Question.

The Court of Appeals apparently denied the fee motion of Sims and FICA[13] and mandated that "each party bear their own costs on appeal," App. C, A218, though the Court did not address the matters of law involved in the fee motion.[14]

The Question might ordinarily follow the merits, but to bring the matter clearly to the Court's attention cross-petitioners submit their Fee Question not as independently requiring conflict review – no court of appeals has

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[13] "All other pending motions are denied." 862 F.2d at 1460, fn. 16 (sentence omitted in No. 88-1950 petition, App. A, A50 fn. 16).

[14] As § 1988 fee petitions normally are filed and taken up on remand after claimant has "prevailed" on appeal, *Solomon v. City of Gainesville*, 796 F.2d 1464 (11th Cir. 1986); *Clients' Council v. Pierce*, 778 F.2d 518 (8th Cir. 1985); *Consolidated Freightways Corp. of Del. v. Kassel*, 556 F.Supp. 740 (S.D. Iowa 1983), *aff'd*, 730 F.2d 1139 (8th Cir. 1984), *cert. denied*, 469 U.S. 834, a mandate in these terms might not preclude a fee application on remand, except for cross-petitioners' submission of a fee motion to the Court of Appeals.

squarely held what we here urge – but as so intimately related to any Eleventh Amendment Question the Court may accept as to be fairly included in the disposition of that Question.

Preserving the Fee Question is, of course, of some moment to cross-petitioners and their counsel as they commit themselves now to any proceedings this Court shall order.[15]

The Fee Question is particularly related to the Eleventh Amendment Question in this case because it is an element of both that The Clean Air Act expressly forbids what the Florida Legislature has enacted in the statute at hand. 42 U.S.C. § 7543(a):

> No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from [the subject vehicles] . . . No state shall require certification, inspection, or any other approval relating to the control of emissions from any [subject vehicle] . . . as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

In one respect the language of 42 U.S.C. § 7543(a) expresses the extent of its preemption of state law, or – to

---

[15] It should be obvious also that cross-petitioners Sims and FICA are able to persevere before this Court, as they did for three years in the Court of Appeals, only in prospect that their fee claim will be addressed on the merits and decided. Their uncompensated counsel otherwise is indentured to the continuing debate over the Eleventh Amendment.

the same effect, in terms of the dormant Foreign Commerce Clause – it specifies *how far* into the state's potential regulatory domain these imports shall be deemed to remain imports, subject exclusively to federal control. But the quoted language does more than simply draw the boundary between federal and state regulatory authority. [The Supremacy and Commerce Clauses do not of their own effect create fee entitlements under 42 U.S.C. § 1983 and 1988. *See Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1984).]

More so than in any case of preemption by the *effect* of Congressional action, the quoted Act explicitly *forbids* any state "certification, inspection, or approval" requirement "as condition precedent to the initial retail sale, titling (if any), or registration"; and the Act expressly *secures* affected citizens in a corresponding right, privilege or immunity against State action of the sort forbidden.

As a claim against Mr. Brantley, an official restored in the place of Attorney General Smith, this claim is cognizible under 42 U.S.C. § 1983, *see Will v. Michigan Department of State Police*, ___U.S.___, at fn. 10 (June 15, 1989), and is remediable by a § 1988 fee award against the State. *Hutto* and *Glover, supra* p. 21.

The Question cross-petitioners would present, therefore, is a stronger version of the question reserved by the Ninth Circuit in *White Mountain*, 810 F.2d 844, 850 fn 8:

> We emphasize that we are not dealing with a case where state action is in actual conflict with the explicit provisions of federal law. Therefore, we need not reach the question whether a Supremacy Clause

claim might give rise to a § 1983 action where preemption was based on such actual conflict. Here we deal only with preemption based on federal occupation of the field and conflict between state law and federal goals and policies.

The Clean Air Act otherwise secures the payment of attorney fees in actions to enforce its provisions. *E.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. ___, 107 S.Ct. 3078 (1987). The Court should decide whether, by the effect of § 7543(a) as well, the Clean Air Act secures privileges and immunities to importers for which a vindicating fee award may be made when they prevail against the State and the "person" who is its surrogate.

CONCLUSION

The Court is respectfully urged to grant the Cross-Petition if any question presented by the Petition is deemed worthy of consideration.

Respectfully submitted,

ROBERT P. SMITH, JR.
Counsel of Record

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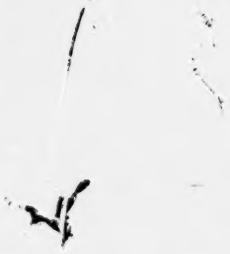
For cross-petitioners.

June 30, 1989



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SUPP. APP. A – ORIGINAL COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

MYRA HOLLADAY SIMS and FLORIDA IMPORT AND COMPLIANCE ASSOCIATION, an unincorporated association, Plaintiffs, vs. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES and JIM SMITH, ATTORNEY GENERAL OF THE STATE OF FLORIDA, Defendants.	)	NO. 84-7214-WS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed July 25, 1985)

MYRA HOLLADAY SIMS and FLORIDA IMPORT AND COMPLIANCE ASSOCIATION, plaintiffs, for their Complaint against STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, and JIM SMITH, ATTORNEY GENERAL OF THE STATE OF FLORIDA, defendants, allege:

1. This civil action arises under the Constitution and laws of the United States, 28 U.S.C. § 1331, for a declaratory judgment and injunctive relief, 28 U.S.C. § 2201, 2202, in that:

(a) Plaintiffs seek relief against defendants to prevent their further attempts to enforce Section 320.02(9), Florida Statutes (Supp. 1984), which provides:

(9) Before a motor vehicle which has not been manufactured in accordance with the federal Clean Air Act and the federal Motor Vehicle Safety Act can be sold to a consumer and titled and registered in this state, the motor vehicle must be certified by the United States Customs Service or the United States Department of Transportation and the United States Environmental Protection Agency to be in compliance with these federal standards. A vehicle which is registered pursuant to this subsection shall not be titled as a new motor vehicle.

* * *

Parties.

* * *

4. Defendant State of Florida, Department of Highway Safety and Motor Vehicles, is the department of state government principally charged to enforce the laws of the State of Florida pertaining to the sale, titling and registration of automobiles, including § 320.02(9), Florida Statutes (1984 Supp.). Defendant Jim Smith is Attorney General of the State of Florida, who is joined as a party defendant in order that he may be heard, agreeably to § 86.091, Florida Statutes (1983), and Rule 5(B) of this Court.

Statement of the claims.

* * *

Count I: Federal Preemption.

9. The Clean Air Act, 42 U.S.C. § 7543, by virtue of the Supremacy Clause of the United States Constitution, preempts to the United States Congress and to EPA and

Customs Service the establishment and enforcement, through the point of first sale in the United States, of motor vehicle emission standards of the character authorized by the Clean Air Act. The State of Florida is preempted from any such enforcement, as by requiring certification or approval by a any official as a condition to the first sale, titling, and registration of such automobiles in the State of Florida. . . .

* * *

12. By Florida's attempted enforcement of its statute, the federal agencies having exclusive responsibility to enforce the Clean Air Act and Vehicle Safety Act are ousted from their discretionary powers to select one effective method of enforcement rather than another; plaintiff Sims and other individual importers are seriously and irreparably damaged in the deprivation of their property, its titling, registration, and effective use; plaintiff FICA's members who business depend on titling and registering such automobiles are irreparably damaged; and the flow of foreign commerce is substantial and unjustably impeded. Unless restrained and enjoined, the defendants will continue so to enforce those unlawful and preempted restrictions against plaintiffs and others.

Count II: Commerce Clause Unconstitutionality.

13. An important part of the commerce of the United States with foreign nations is the importation of automobiles manufactured to foreign standards of emission and safety, for conversion and compliance modification and testing to United States standards and for delivery to importers. That foreign commerce has

increased manyfold in recent years, due in part to the great relative buying power of the American dollar in foreign countries, and due also to foreign manufacturers and their franchised dealers in the United States maintaining high retail sale prices, relative to their costs of manufacture overseas, for automobiles originally manufactured to United States emission and safety standards. In consequence, importers and owners of automobiles not originally manufactured to such standards, but modified and converted to comply with those standards, compete favorably with franchised dealers in the retail market, thus promoting foreign commerce in those automobiles.

* * *

17. Plaintiff have been and will continue to be damaged, as alleged in paragraph 12, unless defendants are enjoined from their enforcement of Florida Statute § 320.02(9).

Count III: Unconstitutional by reason of Art. I, Sec. 3, Constitution of Florida.

* * *

19. Florida's statute § 320.02(9) violates Art. I, Sec. 3 of the Constitution of the State of Florida in that it purports to delegate such standard-setting power as may remain to Florida, exercisable only by its legislative branch, to officials in the executive branch of the Federal government.

20. Plaintiff have been and will continue to be damaged, as alleged in paragraph 12, unless defendants are

enjoined from their enforcement of Florida Statute § 320.02(9).

WHEREFORE, plaintiffs pray for:

1. A declaratory judgment that § 320.02(9), Florida Statutes (1984 Supp.), is preempted as alleged in Count I, or unconstitutional as alleged in Count II, or unconstitutional as alleged in Count III;

2. A preliminary and a permanent injunction against the defendants, enjoining their further enforcement and attempts to enforce the Florida statute; and

3. Such other and further relief as may be proper.

(Counsel's signature omitted)

SUPP. APP. B – ANSWER BY DEFENDANTS

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

MYRA HOLLADAY SIMS and FLORIDA IMPORT AND COMPLIANCE ASSOCIATION, an unincorporated association,
Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES and JIM SMITH, ATTORNEY GENERAL OF THE STATE OF FLORIDA,
Defendants.
_____/

CASE NO. 85-7214-WS

ANSWER
(Filed Aug. 19, 1985)

The Defendants, by and through their undersigned counsel, hereby file their answer to the Plaintiffs' complaint for declaratory and injunctive relief, stating as follows:

1. The Defendants admit that part of Paragraph 1 that states the jurisdiction of this Court, and the reason the Plaintiffs are seeking relief against the Defendants. However, the Defendants deny the remaining allegations of Paragraph 1. . . .

* * *

4. The Defendants admit the allegations of Paragraph 4, but by stipulation in open court, the parties

agreed that Jim Smith, Attorney General, should not be a named party defendant to this action.

* * *

AFFIRMATIVE DEFENSES

First Affirmative Defense

This case must be dismissed for failure to add an indispensable party, the United States Government.

Second Affirmative Defense

The Cause fails to state a claim upon which relief may be granted.

Third Affirmative Defense

Count III of this action is barred by the Eleventh Amendment of the United States Constitution.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ Mitchell D. Franks
Chief Trial Counsel

/s/ Walter Meginnis
Assistant Attorney General

/s/ Eric J. Taylor
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/s/ Michael Alderman
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SUPP APP. C – MOTION TO DROP ATTORNEY GENERAL AS PARTY

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NO. 85-7214-WS

* * *

MOTION TO DROP DEFENDANT SMITH, ATTORNEY GENERAL, AS A PARTY

(Filed Aug. 19, 1985)

Plaintiffs Sims and Florida Import and Compliance Association move the Court to drop as a party to this cause defendant Jim Smith, as Attorney General of the State of Florida. Rule 21, F.R.C.P. Inasmuch as the Attorney General was named a party only to afford him the opportunity to be heard if he chose with party status, and the Attorney General has expressed a preference that he not be a named party, plaintiffs have not effected service upon the Attorney General. It is, therefore, appropriate that the Attorney General be dropped as a named party in this matter. The Attorney General and defendant

Department of Highway Safety and Motor Vehicles have no objection to the granting of this motion.

(signature of Counsel omitted)

SUPP. APP. D – ORDER DROPPING ATTORNEY GENERAL SMITH AS PARTY

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NO. 85-7214-WS

* * *

REFERRAL AND ORDER

Referred to Chief Judge Stafford on August 19, 1985.

Type of Motion/Pleading Motion to Drop Defendant Smith, Attorney General as a Party.

. . .

ORDER OF COURT

It is ORDERED this 29th day of August, 1985.

The relief requested above is granted.

. . .

/s/ William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

SUPP. APP. E – COURT OF APPEALS LETTER TO COUNSEL FEB. 18, 1987

(letterhead)

United States Court of Appeals
Eleventh Circuit

February 18, 1987

TO ALL COUNSEL OF RECORD

Dear Counsel:

Re: No. 86-3055, *Sims v. State of Florida*

The court requests supplemental briefing on the following issues: . . . . (4) if the appellees do have standing to bring this challenge to the Florida statute, is their claim barred by the eleventh amendment of the United States Constitution; and . . . ?

The court is concerned about the standing of appellees to bring this action, about Florida's sovereign immunity under the eleventh amendment, and about the possible mootness of appellee Sims' claim. Although these issues were not raised on appeal by the appellant, the court is obliged to address them *sua sponte*. *See, e.g., Bender v. Williamsport Area School Dist.*, ___ U.S. ___, ___, 106 S.Ct. 1326, 1331 (1986) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.") (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165 (1934)); *Juidice v. Vail*, 430 U.S. 327, 331, 97 S.Ct. 1211, 1215 (1977) ("Although raised by neither of the parties, we are first obliged to examine the

standing of appellees, as a matter of the case-or-controversy requirement associated with art. III, to seek injunctive relief in the District Court."); *Sosna v. Iowa*, 419 U.S. 393, 396 n.2, 95 S.Ct. 553, 555-56 n.2 (1975) (Supreme Court addressed sovereign immunity question although it was not raised by the parties).

. . .

(signature of Clerk omitted)

SUPP. APP. F – OBJECTION BY APPELLEES SIMS & FICA

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 86-3055

* * *

OBJECTION BY APPELLEES MYRA HOLLADAY SIMS AND FLORIDA IMPORT AND COMPLIANCE ASSOCIATION TO CERTAIN INTERLOCUTORY RULINGS AND ACTIONS BY THE COURT

(Filed in Court of Appeals Mar 27, 1987)

Plaintiffs and appellees Myra Holladay Sims and Florida Import and Compliance Association respectfully object to the following interlocutory rulings and actions by this Court:

. . .

2. They object to the Court raising *sua sponte*, as if it were a jurisdictional defect of which the Court was obliged to take notice, an "Eleventh Amendment Defense" that was not previously raised by the only party entitled to raise it, State of Florida, Department of Highway Safety and Motor Vehicle. "[W]e have never held that it [the Eleventh Amendment defense] is jurisdictional in the sense that it must be raised and decided by this Court on its motion." *Patsy v. Florida International University*, 457 U.S. 496, 515 fn. 19, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). The Court's communication dated February 18 was in effect a solicitation of such a defense, which appellant Department now has asserted.

* * *

——— (signature of Counsel omitted)

SUPP. APP. G – APPELLEES' MOTION TO ADD CHARLES BRANTLEY AS PARTY

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 86-3055

* * *

MOTION OF PLAINTIFFS AND APPELLEES MYRA HOLLADAY SIMS AND FLORIDA IMPORT AND COMPLIANCE ASSOCIATION TO ADD CHARLES J. BRANTLEY AS PARTY DEFENDANT AND APPELLANT

(Filed Mar 27, 1987)

Plaintiffs and appellees Myra Holladay Sims and Florida Import and Compliance Association, an unincor-

porated association, move the Court to add as a party defendant and appellant on such terms as are just, or temporarily to relinquish jurisdiction to the District Court that it may do so, Charles J. Brantley, Director of the Division of Motor Vehicles, Florida Department of Highway Safety and Motor Vehicles. Fed. R. Civ. P. 21.

(signature of Counsel omitted)

SUPP. APP. H – ORDER ON OBJECTIONS

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 86-3055

* * *

ORDER

(Filed May 26, 1987)

Before TJOFLAT and HATCHETT, Circuit Judges, and EATON*, Senior District Judge.

BY THE COURT:

Appellees' objection to certain interlocutory rulings and actions by the court is DENIED.

---

*Honorable Joe Eaton, Senior U. S. District Judge for the Southern District of Florida, sitting by designation.

SUPP. APP. I – ORDER ON MOTION

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 86-3055

* * *

ORDER

(Filed May 26, 1987)

Before TJOFLAT and HATCHETT, Circuit Judges, and EATON*, Senior District Judge.

BY THE COURT:

Appellees' motion to add Charles J. Brantley as a party defendant-appellant to the above case is DENIED.

Further, appellees' alternative motion to temporarily relinquish jurisdiction to the U. S. District Court that it may add Charles J. Brantley as a party defendant is DENIED.

*Honorable Joe Eaton, Senior U. S. District Judge for the Southern District of Florida, sitting by designation.

SUPP. APP. J – EXCERPT, IN BANC BRIEF OF APPELLEES SIMS AND FICA BEFORE COURT OF APPEALS, PAGE 48.

(Filed May 2, 1988)

* * *

D. THE ATTORNEY GENERAL SHOULD BE RESTORED AS A PARTY OR MR. BRANTLEY SHOULD BE JOINED TO CURE ANY ELEVENTH AMENDMENT IRREGULARITY.

The panel majority, noting the inequity of honoring the State's "untimely and compelled assertion of the sovereign immunity defense," op. at 684, was disposed to remand to the district court the question of whether the Division's Mr. Brantley should be joined. The dissenting judge did not differ in this, and noted a possible waiver issue. We respectfully request the same relief from the Court in banc. *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 515 n. 19, 102 S.Ct. 2557, 2567 n. 19, 73 L.Ed.2d 172 (1982).

If the Court is disposed to resolve the matter here and now, it should be done by ordering the Attorney General restored as a party defendant. The Attorney General has been "present" throughout these proceedings and has requisite to sue and be sued for the state. *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 275 (5th Cir. 1976). Young himself was Attorney General of Minnesota: *Ex Parte Young*, 209 U.S. 123, 160, 28 S.Ct. 441, 454, 52 L.Ed. 714 (1908).

* * *

SUPP. APP. K – EXCERPT, IN BANC BRIEF OF APPELLEES SIMS AND FICA BEFORE COURT OF APPEALS, PAGES 48-50

(Filed May 2, 1988)

* * *

E. ATTORNEYS' FEES SHOULD BE AWARDED SIMS AND FICA SHOULD THEY PREVAIL, FOR THE JUDGMENT REDRESSES A RIGHT, PRIVILEGE OR IMMUNITY SECURED BY THE CONSTITUTION AND LAWS.

Sims and FICA respectfully renew before the Court in banc their motion filed September 1986 and denied by the panel, ops. p. 675 fn. 6, for award of attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988, and for leave to amend their complaint as necessary to claim that entitlement.

The Division is the properly named defendant for this purpose. *Glover v. Alabama Dept. of Corrections*, 734 F.2d 691, 695-96 (11th Cir. 1984), vacated on other grounds, 473 U.S. ___, 106 S.Ct. 40, 88 L.Ed.2d 33 (1985), on remand, 776 F.2d 964 (11th Cir. 1985).

"[T]he right to attorney's fees under § 1988 is not conditioned upon a judicial determination on the merits" of a claim remediable under § 1983. *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1474 (10th Cir. 1985), summarizing *Maher v. Gagne*, 448 U.S. 122, 132, 100 S.Ct. 2570, 65 L.Ed.2d 653, 663 (1980). Any necessary amendment to make the attorney fee claim is a formality conforming to the proofs and district court findings. *Brandon v. Holt*, 469

U.S. 464, 471 at n. 19, 105 S.Ct. 873, 83 L.Ed.2d 878, 885 (1985).

The Judgment redresses the deprivation of a right, privilege or immunity secured to appellees by the law of the United States, specifically the second sentence of 42 U.S.C. § 7543(a), securing appellees in the federal privilege or immunity of acquire tag and title free of any condition precedent imposed by the state by way of certification, inspection or other approval. *See Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S.Ct. 2502, 65 L.Ed.2d 555, 559 (1980).

Appellees' claim is based too on the Equal Protection Clause of the Fourteenth Amendment, which the district court recognized sufficiently for this purpose by reference to Florida having isolated these cars alone for discriminatory treatment, after discontinuing its general inspection program.

"Section 1988 requires a strong showing of special circumstances to justify denying an award of attorneys' fees and costs to the prevailing party in a section 1988 claim." *Riddell v. National Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980).

* * *

Supreme Court, U.S.
FILED
AUG 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-19

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MYRA HOLLADAY SIMS and FLORIDA IMPORT AND COMPLIANCE ASSOCIATION,

Cross-Petitioners,

vs.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, and CHARLES J. BRANTLEY, DIRECTOR DIVISION OF MOTOR VEHICLES,

Cross-Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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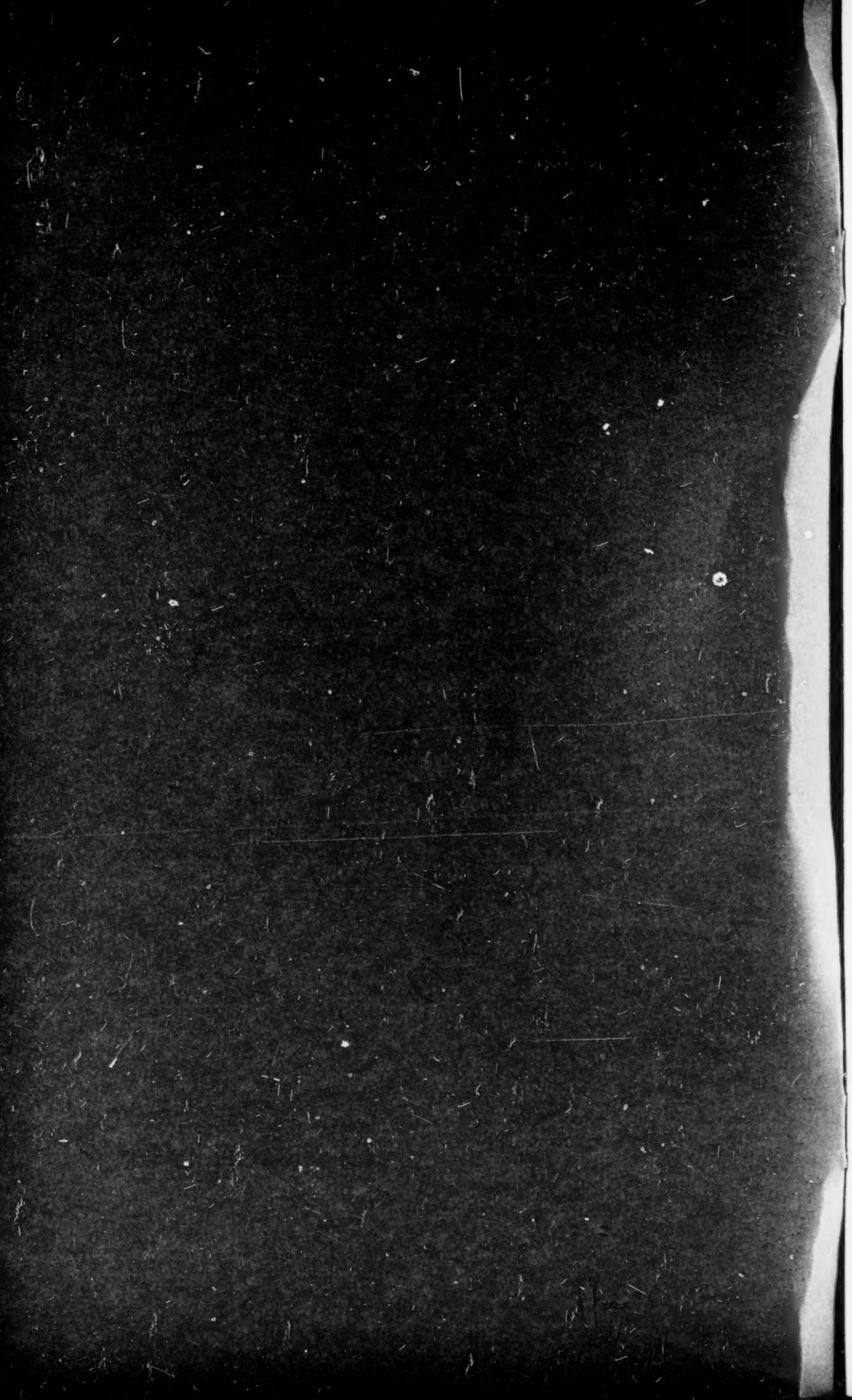

QUESTIONS PRESENTED

1. Whether Edleman v. Jordan, 415 U.S. 651 (1974) and Ford Motor Co. v. Department of the Treasury, 323 U.S. 459 (1945), foreclose the holding of the Court of Appeals that the State of Florida waived its Eleventh Amendment immunity simply because it did not raise the Eleventh Amendment until appeal and was represented by the State's Attorney General below? And, whether the Court of Appeals properly added, sua sponte, as a defendant, the Director of the Division of Motor Vehicles, Florida Department of Highway Safety and Motor Vehicles, in contravention of the Federal Rules of Civil Procedure, to avoid the Eleventh Amendment bar?

2. Whether the issue of attorney's fees was properly denied by the Court of Appeals or, in the alternative, whether the question was sufficiently ruled upon by the Court of Appeals below to allow this Court to review the denial of attorney's fees to the Cross-Petitioners.

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STATEMENT OF THE CASE

The Cross-Respondents do not accept the Cross-Petitioners' Statement of the Case. Cross-Respondents rely upon their Statement of the Case made in their Writ of Certiorari, Case No. 88-1950, repeated partially as follows.

Section 320.02(9), Florida Statutes (1985) requires that all vehicles not manufactured in accordance with the Federal Clean Air Act, 42 U.S.C. §7521 et seq., and the Motor Vehicle Safety Act, 15 U.S.C. §1381 et seq., must be in compliance with the two federal acts before the vehicles can be sold to consumers, titled or registered in Florida. Proof of this compliance is evidenced by a letter from the United States Customs Service (Customs) or letters from the United States Department of Transportation (DOT) and the United States Environmental Protection

Agency (EPA).

On April 30, 1985, Mrs. Sims purchased a used 1976 Mercedes Benz 450 SEL (Mercedes) from Ulrich Kiesewalter of Bonn, West Germany. The car was exported from Europe on April 6, 1985 and imported into the United States at Jacksonville, Florida, on April 30, 1985. The actual sale of the vehicle took place upon its arrival in Jacksonville.

Under federal law, a vehicle not manufactured in accordance with the Clean Air Act, 42 U.S.C. §7521 et seq., or the Motor Vehicle Safety Act, 15 U.S.C. §1381, et seq., may not be imported into the United States. See, 42 U.S.C. §7522 and 15 U.S.C. §1397. Customs permits physical presence of vehicles not manufactured in accordance with the two laws into the country for the sole purpose of modification. However, until the two

federal laws are fully complied with, the vehicle is not "legally" within the United States for unrestricted use. Because of the two laws and Customs regulations, Mrs. Sims posted a Customs Bond and notified both EPA and DOT's National Highway Traffic Safety (NHTSA) of her importation of a non-conforming vehicle.

Mrs. Sims received a letter of exemption from EPA on June 3, 1985, stating that her car did not have to be converted or modified as long as she met EPA's stated requirements. Mrs. Sims received this letter because her vehicle fit into one of EPA's exemptions from physical modification.

On June 3, 1985, Mrs. Sims submitted her Safety Act conversion documentation to NHTSA. At that time, however, NHTSA lacked sufficient staff to quickly process the backlog of pending gray market vehicle

paperwork. In fact, at the time this lawsuit was instituted, in 1985, importers were waiting up to nine (9) months after submitting the paperwork to receive proof of compliance.

Mrs. Sims attempted to obtain Florida title and registration documents for her 1976 Mercedes Benz from the State of Florida. However, due to the NHTSA paperwork backlog, she was unable to produce the documents required by Florida law. Therefore, the Department refused to title or register her car until she could produce letters of compliance from both EPA and from NHTSA or Customs.

Cross-Petitioners' complaint was filed on July 25, 1985 in the United States District Court for the Northern District of Florida. Named in the complaint were the Cross-Respondent Florida Department of Highway Safety and Motor Vehicles and Jim

Smith in his official capacity as Attorney General of the State of Florida. However, only the Cross-Respondent Department was served with a summons and complaint. Counsel for Attorney General Smith questioned his being named in the suit at which point the Cross-Petitioners voluntarily dismissed Attorney General from the suit. No other individual state official was added to the suit at that time or any time later.

The complaint alleged that Section 320.02(9), Florida Statutes (1985), was unconstitutional because it violated the Supremacy and Commerce Clauses of the United States Constitution. The complaint sought declaratory and injunctive relief.

A final hearing/trial was held by the district court on September 12, 1985, and the court issued its Order and Final Judgment on December 30, 1985, finding that

Section 320.02(9) was unconstitutional as it was preempted by both federal acts. The case was appealed to the United States Court of Appeals for the Eleventh Circuit. Four days before oral argument was scheduled to be heard by the panel, at the end of September, 1986, Cross-Petitioners, for the first time, moved the Court of Appeals to amend their complaint to add a civil rights claim under 42 U.S.C. §1983 and also moved for attorneys' fees under 42 U.S.C. §1988.

Subsequent to oral argument, the panel, by letter of February 18, 1987, notified the parties that it wished further briefing on a list of questions prepared by the panel. Two of the five questions raised by the panel were whether the Eleventh Amendment barred the action then pending before the court and whether the Cross-Petitioners had standing to challenge the

Florida statute. The Department responded by asserting its Eleventh Amendment immunity, and that the Cross-Petitioners did not possess standing to challenge the Florida law.

The Eleventh Circuit panel, by a decision of 2-1, reversed in part and affirmed in part the final order of the district court and remanded the case for further proceedings consistent with its decision. Its decision was reported at 832 F.2d 1558 (11th Cir. 1987). In particular, it held that the case should be remanded to the district court to see if the Cross-Petitioners should be granted leave to amend their complaint, implicitly finding that the Department had waived its immunity (832 F.2d at 1570) and denied the Cross-Petitioners' motion for amendment of their complaint and for attorneys' fees (832 F.2d at 1563, fn. 6).

On December 21, 1987, the Cross-Respondent Department filed a Petition for Rehearing and Suggestion for Rehearing In Banc with the court. On March 1, 1988, the Court granted the Cross-Respondent Department's Petition and ordered a rehearing in banc. 840 F.2d 778 (11th Cir. 1988). The case was rebriefed on all the issues raised and decided before the panel. Cross-Petitioners again argued for attorneys' fees, this time in their in banc brief.

On January 11, 1989, the Court of Appeals issued its in banc opinion. Sims v. State of Florida, Department of Highway Safety and Motor Vehicles, 862 F.2d 1449 (11th Cir. 1989). The decision found that Section 320.02(9) was not preempted by the Safety Act but was preempted by the Clean Air Act. However, the court struck the entire law without making any attempt to

determine if the invalid portion of Section 320.02(9) could be severed from the remaining valid provision and upheld. In addition, the Court of Appeals determined the Eleventh Amendment was waived by the Department for a variety of reasons, including that it raised the immunity defense late in the proceedings and and there was a lack of prejudice to the state officials since the Florida Attorney General had represented the state throughout. Finally, the Court of Appeals denied all outstanding motions then pending, including Cross-Petitioners' motion for attorneys' fees.

On January 27, 1989, the Cross-Respondent moved for rehearing in banc asking the court to determine whether it was possible to sever the valid provisions of Section 320.02(9). The Court of Appeals denied the motion for rehearing on March 2,

1989. Cross-Respondents then filed in this Court their Petition for Writ of Certiorari. State of Florida, etc. v. Myra Holladay Sims, et al, Case No. 88-1095.

In addition, Cross-Respondents would make the following responses and additions to the Statement of the Case as set out by the Cross-Petitioners. While the former Attorney General of the State of Florida, Jim Smith, was "named" in the caption of the Cross-Petitioners' complaint, he was never served by the Cross-Petitioners. Counsel for Attorney General Smith informed the Cross-Petitioners, after receiving notice of the suit, that it was his intent to file a motion to dismiss him as a party as he was not a real party in interest. This was based not only on him not having primary authority to enforce Section 320.02(9), Florida Statutes, but also upon the Cross-Petitioners' assertion that

Attorney General Smith was being "joined as a party defendant in order that he may be heard, agreeably to §86.091, Florida Statutes (1983), and Rule 5(B) of the Court." Complaint, para. 5, pp. 4-5.

Therefore, Attorney General Smith was not being named to "neutralize" the Eleventh Amendment, but as a mere courtesy and a requirement under the local district court rules. But whatever was in the minds of the Cross-Petitioners, they never had the former Attorney General served with process and voluntarily dismissed him from the suit. Subsequent to that dismissal, Cross-Petitioners made no attempt to name or serve another official of the State of Florida who may have had jurisdiction over Section 320.02(9), Florida Statutes.

In addition, Cross-Petitioners' assertion in the statement of the case that the Attorney General appeared as a party

overlooks the fact that under Florida law, law that is binding in Eleventh Amendment cases, the Attorney General does not have either constitutional or statutory authority to waive the State's, or any of its agencies, Eleventh Amendment immunity. Consequently, the suit, after the dismissal of the Attorney General, was without any named state official.

The Statement of the Case of the Cross-Petitioners implies that their original complaint, filed in July, 1985, contained a claim brought under 42 U.S.C. §1983. However, this was not the case. The complaint sought relief under the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202 seeking a declaration that Section 320.02(9), Florida Statutes, was in violation of the Supremacy Clause as the Florida statute was preempted by the Clean Air Act and the Federal Highway Safety

Act. Complaint, p. 2-3. Jurisdiction was sought under 28 U.S.C. §1331, federal question jurisdiction. Complaint, p. 2.

At no place in the complaint was relief sought under the Civil Rights Act, 42 U.S.C. §1983, no allegation of a violation of anyone's civil rights nor a request for attorney's fees under 42 U.S.C. §1988.

On September 25, 1986, four days before the scheduled oral argument before the three judge panel of the Eleventh Circuit, Cross-Petitoners mailed their motion to amend their complaint and a request for attorneys fees. The panel, at oral argument, permitted the Cross-Respondents time in which to respond to the Cross-Petitioners' motion. Cross-Respondents responded by asserting a number of grounds in which to deny the Cross-Petitioners' motion. The panel denied this motion. 832 F.2d 1558, 1563, fn. 6.

The Cross-Petitioners again moved in their answer brief to the in banc Court for attoirney's fees. Cross-Respondents were not permitted a response to the Cross-Petitioners' in banc answer brief. Contrary to Cross-Petitioners' assertion in their Statement of the Case, p. 15, Cross-Respondents did not consent to any unplead claim, equal protection or other claim, being tried before the district court. The only issue tried was the one presented, preemption. In addition, there has never been a ruling that the Cross-Petitioners possessed any "right, privilege, or immunity" under the Clean Air Act or that they prevailed in vindicating any "civil right." Because of the Court of Appeals decision, no one is sure why the Court of Appeals denied the Cross-Petitioners' request for attorney's fees.

REASONS FOR GRANTING THE FIRST QUESTION OF THE CROSS-PETITION

While the Cross-Respondents agree with the Cross-Petitioners that the Eleventh Amendment question should be accepted by this Court, the Cross-Respondents disagree with the Cross-Petitioners characterization of the question and their reasons for accepting jurisdiction in this case.

THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BARS FEDERAL COURT JURISDICTION IN THIS CASE.

This case was initially filed by the Cross-Petitioners against the State, its Department of Highway Safety and Motor Vehicles, and the State's Attorney General. Shortly after the commencement of this action the Cross-Petitioners dismissed the Attorney General from the suit and at the time of trial and decision of the district court and ever since, no

individual state official was a named party to the action. The Court of Appeals ruled that the Cross-Respondents waived their immunity under the Eleventh Amendment for the reason that it would be an abuse of discretion if, on remand, the district court should deny a motion to add as a defendant a named official. 862 F.2 at 1460.

The court found this waiver because the Cross-Respondents had not raised the immunity defense at trial or initially on appeal and that the State was not prejudiced by the lack of a named official because the Florida Attorney General, while having been dismissed from the suit by the Cross-Petitioners, represented the State's interest throughout the case. Id., at 1460 and n. 16. To avoid the Eleventh Amendment bar, the Court of Appeals added Mr. Charles J. Brantley, Director of the Division of

Motor Vehicles and announced that the Eleventh Amendment had been satisfied.

The issues raised by the in banc decision are of great importance to the States. Not only does the in banc decision conflict with all decisions of this Court but it also directly conflicts with a decision of the Sixth Circuit Court of Appeals involving nearly identical facts and the same issues.

The decision below is in direct conflict with this Court's decisions on when the Eleventh Amendment immunity defense may be raised and how the immunity defense is to be resolved when it is raised for the first time on appeal. The decision also recognizes an unprecedented form of waiver (no prejudice because a state or one of its agencies is represented by the state's attorney general) and a new remedy to correct the failure to properly name a

state official (sua sponte naming the head of the state agency involved). The naming of a state official at the appellate level also runs afoul of the Due Process Clause as the state official is denied any opportunity to be heard. See, 862 F.2d 1469, Tjoflat, J., dissenting.

There is no question that, as a general rule, a state or one of its agencies, cannot be sued in federal court without its consent. Welch v. State Department of Highways, ____ U.S. ____, 107 S.Ct. 2941 (1987); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984); Dugan v. Rank, 372 U.S. 609 (1963); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). This is a jurisdictional bar which applies regardless of the nature of the relief sought. Papisan v. Allain, 478 U.S. 265 (1986); Pennhurst, 465 U.S., at 100; Cory v. White, 457 U.S. 85 (1982)

(injunctive relief). And, important for this case, the Eleventh Amendment may be raised at any time, Edelman v. Jordan, 415 U.S. 651 (1974), including for the first time on appeal. Ford Motor Co., supra.

While a state may consent to suit in federal court, Pennhurst, 465 U.S., at 99; Clark v. Barnard, 108 U.S. 436, 447 (1883), the state's consent must be unequivocal; Pennhurst, 465 U.S., at 99; Edelman v. Jordan, 415 U.S. at 673. A waiver of the state's immunity must be explicitly authorized by the state in its constitution or laws. Palmer v. Ohio, 248 U.S. 32, 43 (1918). Only the state itself may decide when and where to waive its immunity. Pennhurst, 465 U.S., at 99. In addition, a state may not be sued for injunctive relief, Cory v. White, supra. In order to acquire injunctive relief, an individual state offical must be named. Ex Parte

Young, 209 U.S. 123 (1908).

The State of Florida has not waived its Eleventh Amendment immunity. The sovereign immunity of Florida can only be waived by the Florida Legislature. Article X, Section 13, Florida Constitution; Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 734 F.2d 730, 734 (11th Cir. 1984); Manatee County v. Town of Longboat Key, 356 So.2d 143, 147 (Fla. 1978). Furthermore, the Eleventh Circuit has ruled in other cases that the Florida Legislature had not legislatively waived the State's immunity in federal court. See, Fincher v. State of Florida Department of Labor, 798 F.2d 1371, 1372 (11th Cir. 1986); Gamble v. Florida Department of Health and Rehabilitative Services, 779 F.2d 1509 (11th Cir. 1986). The Florida Legislature has expressly reserved the State's, and its agencies', Eleventh Amendment immunity.

Section 768.28(16), Florida Statutes (1987). The Legislature has not authorized the Florida Attorney General to waive Florida's immunity in any case in which he may appear on behalf of the State or one of its agencies. Therefore, Florida's Eleventh Amendment immunity could not be and was not waived by the appearance of the Attorney General defending this action below.

The Court of Appeals ruled that the State waived its Eleventh Amendment immunity because it did not raise the defense at trial or initially upon appeal. Such a ruling negates the holdings of this Court that the Eleventh Amendment "need not be raised in the trial court", Edelman v. Jordan, 415 U.S. at 678, and that the Eleventh Amendment immunity can even be raised for the first time on appeal, Ford Motor Co., 323 U.S. at 466-

467. In both cases, the immunity defense was not raised at trial.

In Ford Motor Co., the State of Indiana did not assert its Eleventh Amendment immunity until the case reached this Court. Ford Motor Company argued that Indiana had thus waived its Eleventh Amendment immunity defense. This Court rejected that argument saying:

> the objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court.

Ford Motor Co., 323 U.S. at 466-67. This Court reaffirmed that holding in Edelman v. Jordan, supra. There the Illinois officials failed at the district court to raise the immunity defense after being

sued. The Court reaffirmed that the Eleventh Amendment defense could be raised for the first time either on appeal before a circuit court or before this Court. Id., 415 U.S. at 677-78.

The decision of the Court of Appeals below is also in direct conflict with a decison of the Sixth Circuit Court of Appeals on the same issue of waiver. In the case of Estate of Ritter v. University of Michigan, 851 F.2d 846 (6th Cir. 1988), the Sixth Circuit was faced with a factual situation nearly identical to that presented here. The University of Michigan Board of Regents was sued in the Michigan Court of Claims. No individual officials of the Board were named in the action. Id., 851 F.2d at 849. The Board removed the case to federal district court and defended the case on the merits, failing to assert its Eleventh Amendment immunity.

Id. The district court granted summary judgment for the Board on the merits and the plaintiff appealed. Id. at 848. The case was briefed and argued on its merits before the appellate court. Id. At oral argument, the Court of Appeals, raised the question of the Board's Eleventh Amendment immunity. Id. Counsel were requested to file supplemental briefs on the issue and the Board's counsel responded by asserting the Eleventh Amendment immunity defense. Id. The plaintiff responded by asserting the Board had waived the immunity defense by removing the case and not raising the immunity defense earlier. Id. The Court of Appeals rejected the plaintiff's arguments. Relying on the decisions of this Court in Ford Motor Co. and Edelman v. Jordan, it ruled that the Board had not waived its immunity as the Eleventh Amendment defense could be raised at any

time. Id. at 851. The court also ruled that a state's appearance and defense on the merits was no bar to the immunity defense. Id. at 852. This case factually is no different than Ritter.

In this case, Court of Appeals also ruled that the Cross-Respondents could not assert the Eleventh Amendment immunity defense, finding that the State and its officials were not prejudiced because the Florida Attorney General represented the Cross-Respondents throughout the proceeding. Neither this Court, nor any other court, has ever ruled that "lack of prejudice to the state or its officials" was a proper ground for disregarding the express provisions of the Eleventh Amendment.

As this ruling is without precedent, this Court's review is imperative because nearly all states use their attorneys

general, or other state employed attorneys, to defend actions against the state and its agencies. If such a ruling were allowed to stand, every time an attorney general appeared, defended on the merits and failed to raise the immunity issue at trial, he would waive it for that state, thereby negating the holdings of this Court. See, Edelman v. Jordan, 415 U.S. at 677-78. See also, Estate of Ritter v. University of Michigan, 851 F.2d at 852.

The Court of Appeal's attempt to circumvent the Eleventh Amendment by the sua sponte addition of a state official runs counter to the the Federal Rules of Civil Procedure. The action of the Court of Appeals contravenes Rule 21 on the addition of parties and Rule 43 on the substitution of parties. There is no precedent for the action of the Court of Appeals to correct the failure of the Cross-Petitioners to

retain or substitute the proper party.

Finally, the decision below denies the state official added by the in banc court, Cross-Respondent Charles J. Brantley, his constitutional right to due process of law. See, 862 F.2d 1469, Tjoflat, J., dissenting. The newly named official would not be served with the complaint in the case; would not have a right to assert any defenses he may have to the issues in the case; and may likely be saddled with a legal position advanced by the state attorney general that he may disagree with. This lack of basic due process has never been condoned by this Court and has never been a consequence of asserting a state's Eleventh Amendment immunity.

For these many reasons, this Court should take jurisdiction of this case and decide whether a state's Eleventh Amendment immunity is waived when not raised until

appeal or where the court finds a "lack of prejudice"; whether the sua sponte addition of an individual at the appellate level is constitutionally permissible and in accordance with federal rules of procedure; and the rights of a state official to due process when he was not a party to the action in the trial court. The Cross-Respondents request that this Court reverse the judgment of the Court of Appeals and order the case remanded to the district court and dismissed.

REASONS FOR DENYING THE SECOND QUESTION OF THE CROSS-PETITION

A. NO CLAIM UNDER 42 U.S.C. §1983 WAS ALLEGED BY THE CROSS-PETITIONERS IN THE COMPLAINT BEFORE THE DISTRICT COURT

When originally filed in July, 1985, the Cross-Petitioners' complaint only sought declaratory relief, seeking a declaration that Section 320.02(9), Florida Statutes, was in conflict with the Supremacy Clause of the United States Constitution because of the presence of the Motor Vehicle Safety Act, 15 U.S.C. §1381, et seq. and the Clean Air Act, 42 U.S.C. §7521, et seq. The Complaint contained no allegations of any violation of the Cross-Petitioners' civil rights.

Consequently, the Cross-Respondents did not address or rebut any evidence that may have sounded like evidence for a civil rights claim. They specifically did not

consent to any such issues being raised or tried before the district court. Specifically, they would have argued that the Supremacy Clause nor the Commerce Clause create any "right, privilege or immunity" that is protectable by the Constitution or federal law. See, e.g., Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979).

Subsequent to the decision of the district court on December 30, 1985, the Cross-Petitioners did not move for an award of attorney's fees under 42 U.S.C. §1988 or any other legal theory.

B. THE COURT OF APPEALS PROPERLY DENIED THE CROSS-PETITIONERS' MOTION FOR ATTORNEYS' FEES OR, IN THE ALTERNATIVE, DID NOT SET OUT IN ITS DECISION ANY REASONING FOR ITS DENIAL OF CROSS-PETITIONERS' MOTION FOR ATTORNEYS' FEES THAT WOULD PERMIT THIS COURT TO DETERMINE WHETHER THE DENIAL OF THE MOTION WAS LEGALLY SUPPORTABLE.

Shortly after the district court rendered its decision, the Cross-Respondent Department of Highway Safety filed its notice of appeal. The case was forwarded to the Court of Appeals in early 1986 and thoroughly briefed by both parties. After oral argument was set for the last week of September, 1986, and just four days before oral argument was to be held, the Cross-Petitioners, for the first time, moved to amend their district court complaint with a civil rights claim and requested attorney's fees.

Counsel for the Cross-Petitioners addressed this motion to the court of appeals at oral argument. Because of the short notice, counsel for the Cross-Respondent was unprepared to address the issues raised in the motion. The court of appeals allowed Cross-Respondent's counsel time in which to respond to the motion. Cross-Respondent responded by asserting that the attempted amendment of the complaint at that late of date (after close of the trial, final judgment, notice of appeal, briefing and just before oral argument) was against all weight of law as the requested amendment was not timely; resulted in prejudice to the opposing party; and was bad faith on the part of the moving party. See, Foman v. Davis, 371 U.S. 178, 182 (1962).

In addition, the Cross-Respondent asserted that neither the Supremacy Clause

or the Commerce Clause would support an award of attorney's fees as neither Clause concerns individual rights necessary for protection. See, White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1987); J&J Anderson, Inc. v. Town of Erie, 767 F.2d 1469 (10th Cir. 1985); Gould, Inc. v.Wisconsin Dept. of Industry, Labor and Human Relations, 750 F.2d 608 (7th Cir. 1984); Consolidated Freightways Corp. v. Kassel, 730 F.2d 1139 (8th Cir. 1984). The court of appeals denied the Cross-Petitioners' motions without comment.

First, the Court of Appeals was correct in denying the Cross-Petitioners' motion for attorneys' fees. As the Supremacy Clause does not create any right, privilege or immunity within the meaning of 42 U.S.C. §1983, Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 615 (1979), Pirolo v. City of Clearwater, 711 F.2d

1006, 1010-1011 (11th Cir. 1983), a final court order based upon the Supremacy Clause does not give rise to an award of attorney's fees, White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1987); Gould, Inc. v. Wisconsin Dept. of Industry, Labor and Human Relations, 750 F.2d 608 (7th Cir. 1984). The decision of the Eleventh Circuit is consistent with decisions of the other circuits. Therefore, there is no legal or practical reason this Court needs to accept jurisdiction to decide the attorney's fees question.

In the alternative, the decison of the Court of Appeals is not in proper form for consideration by this Court. Without a specific finding by the Court of Appeals as to which of the many possible grounds presented to the court by the Cross-Respondent for denial, we have no way of

knowing upon which ground the Court of Appeals decided. Without knowing the specific reason the court denied the Cross-Petitioners' motion, it would be pure speculation as to what this Court would address on the merits or what question was to be resolved.

If this Court believes the issue of awarding of attorney's fees to the Cross-Petitioners needs to be addressed, then it would be best for the Court to remand the case to the Eleventh Circuit Court of Appeals to give that court the opportunity to cleary state its reasoning in writing for denying the Cross-Petitioners' motion for attorneys' fees. At this point, it is premature to address the attorney's fees question on the merits.

CONCLUSION

For the reasons set out, this Court should grant that part of the Cross-Petition For Writ of Certiorari seeking review of the Eleventh Amendment question.

However, the Court should deny that part of the Cross-Petition seeking review of the attorneys' fees question as Cross-Petitioners did not timely present a potential claim for relief when they had the opportunity to do so or that the Court of Appeals was correct in its decision to deny a motion for attorney's fees. In the alternative, the Court has not been presented with a decision from the court of appeals that would allow it to decide the attorney's fees question on the merits and the case should be remanded to the Court of Appeals for clarification.

Dated: August _____, 1989.

Respectfully submitted

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